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IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1654

ALABAMA CUSTOM TAPE, INC., *et al.*,

Petitioners,

vs.

FAME PUBLISHING CO., INC., *et al.*,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SIDNEY S. ROSDEITCHER
345 Park Avenue
New York, New York 10022
Attorney for Respondents

STEVEN B. ROSENFELD
STEVEN A. COPLOFF
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10022

W. MICHAEL ATCHISON
1007 City Federal Bldg.
Birmingham, Alabama 35203
Of Counsel

July 30, 1975

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Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit was reported at 507 F.2d 667 and is reprinted as Appendix A to the Petition herein.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Whether the compulsory license provision of the Copyright Act, 17 U.S.C. §§1(e) and 101(e), applies to the copying of copyrighted musical compositions by means of unauthorized duplication of original sound recordings of such compositions, and thereby bars a claim of copyright infringement by an owner of the composition copyrights who has not consented to such use?

Statutes Involved

This case involves construction of Sections 1(e) and 101(e) of the Copyright Act, 17 U.S.C. §§1(e) and 101(e), printed at pages A.19 through A.21 of the Petition for Certiorari.

Statement of the Case

The Statement of the Case included in the Petition, as well as the facts and issue as set forth in the decision below, leave no room for doubt that the present Petition raises precisely the same issue of law which has been presented to this Court three separate times within the past three years. In each of those cases—twice during the year 1975—this Court denied a petition for certiorari. *Melody Recordings, Inc.* v. *Jondora Music Publishing Co.*, —— U.S. ——, 43 U.S.L.W. 3644 (June 9, 1975); *Colorado Magnetics, Inc.* v. *Edward B. Marks Music Corp.*, —— U.S. ——, 42 L. Ed.2d 819 (Jan. 20, 1975); *Duchess Music Corp.* v. *Stern*, 409 U.S. 847 (1972).

BLEED THROUGH

In the foregoing cases, the Third, Tenth and Ninth Circuits each decided, precisely as the Fifth Circuit has here, that the compulsory license provision of the Copyright Act (17 U.S.C. §§1(e) and 101(e)) does not apply to the copying of copyrighted musical compositions by means of unauthorized duplication of original sound recordings. *Jondora Music Pub. Co.* v. *Melody Recordings, Inc.*, 506 F.2d 392 (3rd Cir. 1974); *Edward B. Marks Music Corp.* v. *Colorado Magnetics, Inc.*, 497 F.2d 285 (10th Cir. 1974); *Duchess Music Corp.* v. *Stern*, 458 F.2d 1305 (9th Cir. 1972).

Argument

Before denying certiorari in *Colorado Magnetics*, this Court requested and received a brief *amicus curiae* from the Solicitor General of the United States, which concluded that the Tenth Circuit had "decided the issue correctly and, in the absence of a conflict among the circuits, it is unnecessary for this Court to hear the case." *Brief of the United States as Amicus Curiae* (December 1974), p. 16 (hereinafter cited as *"S.G. Brief"*). Since then, two more United States Courts of Appeals—the Third Circuit in the *Jondora* case and the Fifth Circuit in the instant case—have reached the same result on the identical question of law. Thus, far from a conflict among the circuits, there is complete unanimity among the circuits on this question and absolutely no reason for granting the present Petition. The four Court of Appeals decisions are also consistent with the earliest constructions of the compulsory license provision and represent the only interpretation which does not do violence to the plain meaning of the statutory language and the objectives which Congress sought to achieve when it enacted that provision in 1909.

The Petition here presents no argument not considered and rejected by the Tenth, Third and Fifth Circuits and not previously presented to this Court in the petitions filed in the *Colorado Magnetics* and *Jondora* cases. The present Petition, like those petitions, confuses the distinct rights of music publishers in original musical compositions and those of the manufacturers of sound recordings of performances of those compositions. That confusion leads them into what the Fifth Circuit below called "conceptual cul de sacs" (Pet., p. A.9), such as reliance upon the Sound Recording Act of 1971 and this Court's decision in *Goldstein* v. *California,* 412 U.S. 546 (1973). But, as the Tenth, Third and Fifth Circuits have all held, neither that statute nor that decision has any bearing whatever on the issue presented here.

The 1971 Amendment for the first time gave *record manufacturers* rights and remedies against unauthorized duplicators, but it had no effect whatever on the pre-existing rights of the owners of composition copyrights. Indeed, as all of the circuit court opinions have recognized, the only reason the 1971 Amendment figures in this case is because of references in the legislative history indicating the view of some members of Congress or of congressional committee staffs that, prior to that enactment, duplicators were free to take advantage of the compulsory license provision.

But the Third, Fifth and Tenth Circuits—in almost identical language—all concluded that such references in the 1971 legislative history were not a reliable guide to the construction of the compulsory license provision, which

was adopted many years before by another Congress. Pet., pp. A.9-A.10; *Jondora Music Pub. Co.* v. *Melody Recordings, Inc., supra,* 506 F.2d at 396; *Edward B. Marks Music Corp.* v. *Colorado Magnetics, Inc., supra,* 497 F.2d at 289-90; see also *United States* v. *Southwestern Cable Co.,* 392 U.S. 157, 170 (1968) ("the views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any, significance' "). As the Solicitor General's *amicus* brief in *Colorado Magnetics* stated: "[I]t is the words and the legislative history of the 1909 Act, and not the misconceptions at a later date, that control the meaning of Section 1(e)." (*S.G. Brief* at 15).

Likewise, all three Court of Appeals decisions decided after *Goldstein* agreed that this Court in *Goldstein* did not even consider, much less decide, the issue here presented. Pet., p. A.9, n.2; *Jondora Music Pub. Co.* v. *Melody Recordings, Inc., supra,* 506 F.2d at 396; *Edward B. Marks Music Corp.* v. *Colorado Magnetics, Inc., supra,* 497 F.2d at 289.

Nothing in *Goldstein* requires the conclusion that the compulsory license provision sanctions unauthorized duplication. This Court there upheld the constitutionality of a state statute making record and tape piracy a crime. It was considering an alleged conflict between federal and state law with respect to the protection of rights in "records, as *renderings of original artistic performance*" (412 U.S. at 566) (emphasis by the Court), not in the underlying compositions. It concluded that the states were free to grant such protection because Congress had "indicated neither that it wishes to protect, nor to free from protection,

recordings of musical performances fixed prior to February 15, 1972" (412 U.S. at 571) and thus no "conflict between state law and federal law arises in the case of *recordings of musical performances*" (412 U.S. at 570) (emphasis added).

Thus, *Goldstein* would be pertinent only if the publishers, as erroneously supposed by petitioners, were asserting a protected interest in the sound recordings themselves. But it is not a federal right in records which the publishers assert, but their own rights to prevent infringement of their copyrighted musical compositions. Petitioners cannot claim that the realm of activities here at issue had been "left unattended" by Congress (Pet., p. 6), since they themselves rely on the compulsory license provision of the 1909 Copyright Act as their sole defense to the claim that they infringed the publishers' copyrights. It is simply the proper construction of that provision which is in controversy, and the four circuits have all rejected the construction urged by petitioners. There is thus no conceivable conflict between the Fifth Circuit's holding and that of *Goldstein*.

In the final analysis, it is the intention of the 1909 Congress, as expressed in the plain meaning of the compulsory license provision and the legislative history underlying it, not the 1971 legislation or the 1973 *Goldstein* decision concerning different rights in sound recordings, which disposes of this controversy. It is by now beyond serious dispute that the decisions of the Third, Fifth, Ninth and Tenth Circuits embodied the only reading of the statute which is in harmony with that intention.

Conclusion

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SIDNEY S. ROSDEITCHER
345 Park Avenue
New York, New York 10022
Attorney for Respondents

STEVEN B. ROSENFELD
STEVEN A. COPLOFF
PAUL, WEISS, RIFKIND,
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